

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IN RE:  OFFICE OF CONSUMER ADVOCATE,  Complainant,  vs.  UKI COMMUNICATIONS, INC.,  Respondent.	DOCKET NO. FCU-02-27
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**PROCEDURAL ORDER AND NOTICE OF HEARING**

(Issued February 4, 2004)

**Background**

On October 3, 2002, Ms. Rebecca Jones called the Utilities Board (Board) and complained that her long distance service had been switched to UKI Communications, Inc. (UKI) without her authorization. She stated that UKI billed her \$31.48. She further stated that when she called UKI and said she had been slammed, UKI hung up on her. She stated she called back a few times, waited for long periods of time, and UKI hung up on her without allowing her to talk with anyone.

The details of the complaint are contained in informal complaint file number C-02-338, which is incorporated into the record in this case pursuant to 199 IAC 6.7.

Upon receiving the complaint, Board staff attempted to informally resolve the dispute. Board staff forwarded the complaint to UKI for response. UKI responded on October 22, 2002, and stated that a sales agent for UKI spoke to Mr. Randy Berenger, who consented to the switch. UKI enclosed a CD recording of what it stated was the third-party verification of Mr. Berenger's consent. UKI stated it had complied with applicable legal requirements, but would issue a refund for \$18.14 as a credit on Ms. Jones' telephone bill. Due to a clerical error in the letter, it is somewhat unclear how UKI calculated this amount.

On October 30, 2002, Board staff forwarded a copy of the recording to Ms. Jones and asked for a response. Ms. Jones and Mr. Berenger each provided a written response. Ms. Jones remembered the call, alleged the recording was a fake and was edited to suit UKI's needs, and stated the call involved a request for a donation to a fireman's ball. She also stated she had additional charges from UKI on her telephone bills. Further details are contained in her letter. In his letter, Mr. Berenger stated the recording was not authentic, that he remembered the call, and that he spoke to a real person regarding making a donation to the local firemen's ball. He stated he was never asked about being the decision maker regarding any local or long distance carrier. He stated the recording had been altered, and that the conversation on the recording is definitely not the one he participated in. Further details are contained in his letter.

On November 19, 2002, Board staff forwarded the letters from Ms. Jones and Mr. Berenger to UKI and requested a response to the letters, a clarification of the total amount of UKI charges on the account, and an indication of the total amount of credit issued to the customer. UKI responded by letter addressed to Ms. Jones dated December 4, 2002, with a copy going to Board staff and the Consumer Advocate Division of the Department of Justice (Consumer Advocate). UKI stated that all of its telemarketers are monitored to ensure that they follow a telemarketing sales script, and included a copy of the script. Although the letter is unclear, it appears that UKI stated there was no mention of a donation to a fireman's ball in the script. UKI apologized for any inconvenience or confusion and stated it issued a credit of \$9.19. UKI did not clarify the total amount of UKI charges on the account as requested, nor did it state the total amount of credit issued to the customer. UKI did not state how it calculated the \$9.19 amount of the credit.

On December 17, 2002, Board staff issued a proposed resolution describing these events, explaining the third-party verification process, and concluding that UKI provided acceptable proof of authorization to switch Ms. Jones' long distance telephone service. The letter informed Ms. Jones of the procedure if she disagreed with the proposed resolution. Ms. Jones did not challenge the proposed resolution.

On December 31, 2002, the Consumer Advocate petitioned the Board to commence an administrative proceeding to impose a civil penalty for a slamming violation. The Consumer Advocate stated the file does not support the proposed

resolution, the recording is suspicious, and until UKI dispels the allegations, it has failed to provide the required authorization and violated Iowa Code § 476.103 (2001). The Consumer Advocate requested a formal proceeding, argued a civil penalty should be imposed, and stated the Board should consider other alleged violations by UKI when determining the amount of the penalty.

On January 21, 2003, UKI filed a response to the Consumer Advocate's petition and a motion to dismiss the petition. UKI argued the Consumer Advocate's petition is not authorized by Iowa law and that imposition of a civil penalty is inappropriate as a factual matter. UKI stated Board staff concluded no slam occurred. It further stated UKI does not own, direct, manage, or have any relationship in any way with its third party verifier, other than as a customer for verification services. Therefore, it argued, no reasonable grounds exist for believing that UKI's verifier spliced the tapes for UKI's benefit. UKI further argued that many of the customer's allegations were either incorrect or not substantiated. UKI argued it complied with Iowa law and denied other previous alleged slams have any bearing on this case.

On January 28, 2003, the Consumer Advocate filed a reply memorandum. The Consumer Advocate argued its petition is authorized by Iowa law, that UKI violated Iowa law, and that the Board should commence a formal proceeding and impose a civil penalty pursuant to Iowa Code § 476.103 rather than § 476.3. The Consumer Advocate further stated that dismissal on factual grounds is inappropriate

and the alleged conduct, if it occurred, is outrageous. The Consumer Advocate argued the factual disputes cannot properly be resolved without hearing and the motion to dismiss should be denied.

On January 8, 2004, the Board issued an order finding sufficient information to warrant further investigation, docketing the proceeding, and ordering the parties to submit a status report. On January 26, 2004, the Consumer Advocate filed a status report that stated it adhered to its previously stated position. UKI did not file a status report or join in that of the Consumer Advocate.

On January 30, 2004, the Board issued an order finding the status report inadequate and assigning the case to the undersigned administrative law judge. On February 2, 2004, the Consumer Advocate filed a supplemental status report. In the supplemental report, the Consumer Advocate stated Ms. Jones would be unable to testify for reasons that need not appear of record and that Mr. Berenger could testify but is unable to come to Des Moines for the hearing. The Consumer Advocate proposed that Mr. Berenger testify by telephone.

Pursuant to Iowa Code §§ 476.3(1) and 476.103(4), and 199 IAC 6.5, a procedural schedule will be established and a hearing regarding this complaint will be held if needed.

The statutes and rules involved in this case include Iowa Code §§ 476.3 and 476.103 and Board rules at 199 1.8, 22.23, and Chapters 6 and 7. A link to the

Board's administrative rules (in the Iowa Administrative Code (IAC)) is contained on the Board's website at [www.state.ia.us/iub](http://www.state.ia.us/iub).

### **The issues**

The issues in this case generally involve the change of Ms. Jones' local toll service from AT&T to UKI, whether UKI complied with state and federal law when it changed Ms. Jones' local toll service, whether imposition of a civil penalty is appropriate, and what should be done to resolve the case. Other issues may be raised by the parties prior to and during the hearing.

### **Prepared testimony and exhibits**

All parties will have the opportunity to present and respond to evidence and make argument on all issues involved in this proceeding. Parties may choose to be represented by counsel at their own expense. Iowa Code § 17A.12(4). The proposed decision that will be issued in this case must be based on evidence contained in the record and on matters officially noticed. Iowa Code §§ 17A.12(6) and 17A.12(8).

The submission of prepared evidence prior to hearing helps identify disputed issues of fact to be addressed at the hearing. Prepared testimony contains all statements that a witness intends to give under oath at the hearing, set forth in question and answer form. When a witness who has submitted prepared testimony takes the stand, the witness does not ordinarily repeat the written testimony or give a substantial amount of new testimony. Instead, the witness is cross-examined

concerning the statements already made in writing. The use of prepared testimony and submission of documentary evidence ahead of the hearing prevents surprise at the hearing and helps each party to prepare adequately so a full and true disclosure of the facts can be obtained. Iowa Code §§ 17A.14(1) and (3).

**Party status and communication with the Board**

The Consumer Advocate and UKI are currently the parties to this proceeding. If Ms. Jones wishes to be a party to this case, she must notify the Board in writing in accordance with the procedural schedule established in this order.

Each party must file an appearance identifying one person upon whom the Board may serve all orders, correspondence, or other documents. The written appearance must substantially comply with 199 IAC 2.2(15). The appearance must include the docket number of this case as stated in the caption above. Appearances must be filed at the earliest practical time with the Executive Secretary, Utilities Board, 350 Maple Street, Des Moines, Iowa 50319. The appearance must be accompanied by a certificate of service that conforms to 199 IAC 2.2 and verifies that a copy of the document was served upon the other parties.

Any party who communicates with the Board should send an original and ten copies of the communication to the Executive Secretary at the address above, accompanied by a certificate of service. One copy of the communication should also be sent at the same time to each of the other parties to this proceeding. These

requirements apply, for example, to the filing of an appearance or to the filing of prepared testimony and exhibits with the Board.

Ex parte communication is prohibited as provided in Iowa Code § 17A.17. Parties or their representatives and presiding officers shall not communicate directly or indirectly in connection with any issue of fact or law in a contested case except upon notice and an opportunity for all parties to participate. The undersigned administrative law judge is the presiding officer in this case.

Pursuant to 199 IAC 6.7, the written complaint and all supplemental information from the informal complaint proceedings, identified as Docket No. C-02-338, are part of the record of this formal complaint proceeding.

The materials that have been filed in this docket are available for inspection at the Board Records and Information Center, 350 Maple Street, Des Moines, Iowa 50319. Copies may be obtained by calling the Records and Information Center at (515) 281-5563. There will be a charge to cover the cost of the copying.

All parties should examine Iowa Code §§ 476.3, 476.103, and Board rules at 199 IAC 1.8 and 22.23, and Chapters 6 and 7, for substantive and procedural rules that apply to this case.

### **Stipulation of Facts and Prehearing Brief**

The facts underlying this case have already been the subject of an informal complaint proceeding. Therefore, it is appropriate that the parties file a stipulation of facts, so that only facts in dispute need be resolved in this formal complaint



proceeding. In addition, it is appropriate that the parties file prehearing briefs that identify and discuss their respective positions. Finally, the parties must discuss whether it is possible to settle this case without further formal proceedings and the involvement of the undersigned administrative law judge.

**IT IS THEREFORE ORDERED:**

1. If the parties are unable to settle this case, on or before February 17, 2004, the parties must file a document stipulating to as many of the facts in this case as possible. The stipulation must also identify which facts remain in dispute and need to be resolved. The parties must also state whether they believe a hearing is necessary in this case, or whether the case could be submitted on the stipulated facts, prefiled testimony and evidence, and the prehearing briefs. If Ms. Jones wishes to become a party to this case, she must file written notice with the Board no later than February 17, 2004, and must join in the stipulation of the parties.

2. If the parties are unable to stipulate to all the facts of this case, prefiled testimony and exhibits must be filed only with respect to the facts that remain in dispute and need to be resolved in this proceeding.

3. If needed pursuant to paragraph two, on or before February 24, 2004, the Consumer Advocate and any intervenors must file prepared direct testimony and exhibits and a prehearing brief. The prepared direct testimony may refer to any document already in the record, and parties do not need to refile exhibits already submitted in the informal complaint process and made a part of the record. In

prepared testimony and exhibits, the Consumer Advocate and any intervenors must address the issues discussed above, and file any other evidence not previously filed. In its prepared testimony and exhibits, the Consumer Advocate must address the total amount of UKI charges on Ms. Jones' account and the total amount of credit that UKI provided to Ms. Jones' account, unless this information was provided in the stipulation of facts. The Consumer Advocate should use exhibit numbers one and following. In its prehearing brief, the Consumer Advocate must state what actions it believes would be necessary to bring this matter to a proper resolution, and why such actions would be appropriate and in accordance with applicable law.

4. If needed pursuant to paragraph two, on or before March 9, 2004, UKI must file prepared testimony and exhibits and a prehearing brief. UKI may refer to any document in the record, and does not need to refile exhibits already submitted in the informal complaint process and made a part of the record. In its prepared testimony and exhibits, UKI must address the issues discussed above and file any other evidence not previously filed. In its prepared testimony and exhibits, UKI must address the total amount of UKI charges on Ms. Jones' account and the total amount of credit that UKI provided to Ms. Jones' account, unless this information was provided in the stipulation of facts. On the third-party verification recording provided by UKI, the verifier refers to "United Communications" rather than "UKI Communications." In its prepared testimony and exhibits, UKI must address this discrepancy, unless it was addressed in the stipulation of facts. UKI should use

exhibit numbers 100 and following. In its prehearing brief, UKI must state what actions it believes would be necessary to bring this matter to a proper resolution, and why such actions would be appropriate and in accordance with applicable law.

5. If the Consumer Advocate or any intervenor is going to file prepared rebuttal testimony and exhibits, it must do so by March 16, 2004.

6. A hearing for the presentation of evidence and the cross-examination of witnesses will be held in the Board Hearing Room, 350 Maple Street, Des Moines, Iowa, on Tuesday, March 23, 2004, commencing at 10 a.m. Each party must provide a copy of its prepared testimony and exhibits to the court reporter. If any party or witness wishes to be connected to the hearing by telephone conference call, that person must dial into the bridge line, 1-866-708-4636, at the beginning of the hearing. Persons with disabilities requiring assistive services or devices to observe or participate should contact the Utilities Board at 1-515-281-5256 no later than Thursday, March 18, 2004, to request that appropriate arrangements be made.

7. In the absence of objection, all data requests and responses referred to in oral testimony or on cross-examination will become part of the evidentiary record of these proceedings. Pursuant to 199 IAC 7.2(6), the party making reference to the data request must file one original and three copies of the data request and response with the Executive Secretary of the Board at the earliest possible time.

8. Any person not currently a party who wishes to intervene in this case must meet the requirements for intervention in 199 IAC 7.2(7). The person must file

a petition to intervene on or before 20 days following the date of issuance of this order, unless the petitioner has good cause for the late intervention. 199 IAC 7.2(8).

**UTILITIES BOARD**

/s/ Amy L. Christensen  
Amy L. Christensen  
Administrative Law Judge

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary

Dated at Des Moines, Iowa, this 4<sup>th</sup> day of February, 2004.